

ARBITRATION

Department of Veterans Affairs

FMCS No. 09-50526

and

AFGE, National VA Council

Bernard Ries
Arbitrator

OPINION AND AWARD

This matter was heard on February 11, 2009, at which time the taking of evidence was completed and the hearing adjourned sine die so that the parties might engage in settlement discussions. Subsequently, those efforts having failed, briefs were filed on certain dates in mid-April. As presented at the hearing, the case addresses two grievances: a "national grievance" filed by the National VA Council of the American Federation of Government Employees (here, "AFGE" or "NVAC") and a "national counter-grievance" filed by the United States Department of Veterans Affairs ("VA"). We first consider AFGE's complaint.

I. Basic Facts of the AFGE National Grievance

AFGE and VA have been in a national bargaining relationship since about 1980, when AFGE was certified to cover two nationwide bargaining units (one for professional employees, the other for non-professionals) which now include some 161,000 employees represented by 193 local unions at around 168 locations. In about 2002, the parties began renegotiating their Master Agreement, which had been executed in 1997 for a three-year term and thereafter operated on a year-to-year basis. Since 2002 (with a lengthy hiatus because of a dispute), the negotiations have continued; how close the parties are in 2009 to a successor agreement is anyone's guess.

Around 2004, after a lengthy period of development, the Office of Personnel Management ("OPM") brought to the governmental market a web-based software program called USA Staffing ("USAS"). The program is licensed to Federal agencies which choose to pay for it and can be used to electronically manage the entire extra-agency recruitment (and also internal promotion) process, from application to hiring, functions which, in the past, have been essentially paper-based. Some 30 or 40 agencies have since purchased the OPM program for at least part of their employee hiring system.

VA became interested in USAS in about 2006 and, after consultations with OPM about the program's adaptability to the VA structure, in 2007 began to test the system in the hiring of non-AFGE-unit employees at various locations. On March 28, 2007, Meghan Flanz, a VA deputy assistant secretary, wrote to both Alma L. Lee, president of NVAC, and Oscar L. Williams, Jr., second executive vice-president of that body, to formally

announce that the Union had “selected [USAS] as the software program of choice to process and manage job applications.” She described USAS’s uses, its anticipated phase-in timing, and the current deployment of the system at 14 VA offices throughout the country, and she listed the “benefits” from adopting the program, the “changes” it would make in the existing process, and “what will not change.” Flanz’s letter closed by inviting contact “if you are interested in a briefing or would like to bargain on this subject” or if VA had questions about USAS.

By letter of April 5, 2007, Vice-President Williams replied that NVAC “is formally demanding to bargain on VA’s use of USA Staffing recruitment and application process for filling AFGE bargaining unit positions. The implementation of this process without prior notice to the exclusive representative constitutes a by-pass and refutation of the bargaining agreement.” He went on to state that he had been informed by AFGE local agents that VA had been “filling bargaining unit positions with USA Staffing software,” and he declared that Article 22 of the existing contract “does not allowed [sic] the parties to make any change through Mid-Term Bargaining.¹ Therefore the implementation of USA Staffing or any similar process can only be made during term negotiation.” By the latter phrase, Williams was referring to negotiation done as part of the ongoing bargaining for an overall national agreement, as opposed to bargaining under a contract provision that authorizes “mid-term bargaining” by standing committees during the existing term.

Article 22, the asserted violations of which the Union complains in this case, is entitled “Merit Promotion,” and it explains its purpose as ensuring “that promotions are made equitably and in a consistent manner.” It occupies 15 pages of the Master Agreement, but the sections specifically mentioned by AFGE as having been violated cover “Vacancy Announcements and Areas of Consideration,” “Panel for Competitive Action,” and “Sources of Information on Candidates.”²

The record is silent as to further communication between the national parties on this subject until a July 9, 2007, letter to NVAC President Lee from Paul J. Hutter, then the director of VA’s Office of Human Resources and Administration, following up his (with two other VA officials) meeting with Lee that morning, in which VA had expressed interest in negotiating with NVAC “*on a mid-term basis* over the use of USA Staffing to process employment applications submitted by AFGE bargaining unit members”(emphasis added). Hutter’s letter recounts that Lee had stated she “would be willing to negotiate over the use of USA Staffing now, rather than as part of the ongoing master agreement renegotiation” if the agency would agree to certain concessions. Hutter,

¹ This was literally true of Article 22 itself, but other provisions make clear that Article 22 is not contractually immune from mid-term bargaining.

² A provision of Article 22 requires that “[p]rior to considering candidates from outside the AFGE bargaining unit, the Employer agrees to first consider internal candidates for selection.” How the phrase “first consider” has been applied is not involved here, although two of AFGE’s witnesses seemed to be confused about the matter. The Union’s concern about Article 22 appears to be that the introduction of USAS would diminish its influence over selection of outsider applicants for jobs which could constitute promotions for employees already in the bargaining unit. An AFGE witness testified, for example, that her facility “hired someone from Florida that nobody even knows.”

upon consideration, declined the offer as too costly. He observed, in closing, that he expected VA to make “adequate use of the USA Staffing program in connection with non-AFGE bargaining unit applicants,” and he asked Lee to call if she wished further discussion.

The record does not indicate any response by Lee, nor does it show any contact between the parties about USAS for the next six months. By letter of January 13, 2008, to Lee, however, Hutter again broached the subject of negotiating about USAS “as a mid-term item,” asking her to meet with him and a new assistant secretary. Again, there is no evidence of a response by Lee.

Five months passed. On June 27, 2008, AFGE filed the 9-page national grievance underlying this case, alleging, in material part, that VA had violated sections of Article 22 of the master agreement “as a result of VA’s implementation and use of the Office of Personnel Management’s USA Staffing...in conjunction with USAJOBS...to automate ‘the recruitment, assessment, referral, and notification process.’”

USAJOBS is, as the grievance states, “the official job site of the Federal Government;” it is essentially a bulletin board with a search engine upon which government employment opportunities must be listed,³ but it has nothing to do with the subsequent evaluation and hiring process that occurs after a job-seeker applies to a government agency for a posted job. The testimony, as noted hereafter, demonstrates that AFGE officials had been aware of VA’s use of USAJOBS for years without complaining about it. The record makes plain that even though VA may have posted available positions on USAJOBS, it also adhered to the local posting and selection process mandated by the bargaining agreement at its AFGE-represented locations.

II. Conclusions about the AFGE Grievance

AFGE’s first argument on brief is devoted to a defense of the timeliness of its grievance.⁴ The relevant contract language (Article 42, Section 11--“National Level Grievances”) provides:

Grievances between the Department and the Union at the national level shall be filed by the aggrieved party as follows:

- A. Within thirty (30) calendar days of the act or occurrence or within thirty (30) days of the date the party became aware or should have become aware of the act or occurrence or at any time if the act or occurrence is continuing, the aggrieved party (VA Headquarters or the National VA Council) may file a written grievance with the other.

³ Van Yee, a senior program analyst at OPM, testified that “it is required by law...that all agency postings...recruiting candidates from outside their own employees...under Title 5...have to post on USAJOBS.” This statement was not contradicted.

⁴ VA also recognizes on brief that the timeliness of its own grievance is in issue.

AFGE argues that its grievance met the foregoing standards in two ways. First, the brief assumes that the "AFGE-NVAC Grievance and Arbitration Committee" has the authority on its own to file a grievance; that, however, is seemingly contrary to the above provision, which names "the National VA Council" as the Union "aggrieved party." Equally, the assumption is not consistent with the testimony of Valorie Reilly, a Committee member, who testified about the Committee's function: "[W]e vote to recommend national grievances to be filed against VA."

The brief then asserts that the Committee *collectively* "first became aware of the issue of the Agency's use of USA Staffing and USAJOBS occurring at various locals in violation of ...Article 22,...and...voted to file a National Grievance on this issue" at a teleconference which occurred on June 2, 2008, that is, 25 days before the June 27 grievance. The problem is that the assertions--that the Committee in fact held a conference on June 2, and at that conference for the first time considered the issues subsequently raised by the grievance--are not supported by any evidentiary underpinning. Reilly, the sole witness on the point, testified, "I remember the discussion and it appeared to be widespread throughout the VA networks and we voted to pursue this as a national grievance," but she did not indicate the date on which this vote was held. Thus, the grievance has not been shown to be timely under the contractual test of "within 30 days of the date the party became aware."

But AFGE also relies on the contract's allowance of a grievance "at any time if the act or occurrence is continuing." The argument is that the VA's allegedly improper conduct was "ongoing and continuous" because of the "Agency's use of USA Staffing and USAJOBS occurring at various locals." But, as will be seen, I do not conclude that the use of USAJOBS was a constituent element of the AFGE grievance as filed, and there is simply no evidence that VA ever applied the USAS system to members of the bargaining unit or that AFGE had any rational basis for so thinking.

The doctrine of "continuing" violations, expressly made applicable in this bargaining agreement, has often been invoked by arbitrators in situations in which lost benefits are involved, *e.g.*, where an employee was entitled to receive a raise beginning on a prescribed date, but never received it. Arbitrators who adopt such an approach usually consider each subsequent failure to pay as a new, recurring, violation and will entertain a claim for payment after the original default, but will typically provide only a hybrid remedy, honoring the contractual limitation by confining the employer's liability to those non-payments actually caught within the grievance deadline of the contract. However, applying this rationale in the present setting, in which there has been no determinable loss at any time, would be at odds with the grievance procedure's stated objective "to provide a mutually acceptable method for prompt and equitable settlement of grievances" (Article 42, Section 1). I conclude that the continuing violation theory is inapplicable here, and that the grievance has not been shown to be timely filed.

I also would find that the grievance fails on the merits. It is necessary to first discuss the precise nature of the claim in issue. AFGE's grievance as filed asserts that VA violated the Master Agreement "as a result of VA's implementation and use of...USA

Staffing...in conjunction with USAJOBS...to automate the recruitment, assessment, referral, and notification process.” But on brief, AFGE restates the issue and characterizes the violations as having occurred when VA “implemented and/or used USA Staffing and/or USAJOBS to staff...and fill AFGE bargaining unit positions...,” thereby assigning to USAJOBS a separate culpability. The record shows that the gravamen of the complaint is that VA impermissibly put the USAS program, and only that program, into effect for bargaining unit employees. While the filed grievance does refer to the implementation and use of USAS “in conjunction with USAJOBS,” it does not single out the role played by the entity USAJOBS as independently constituting violations; in any event, the record leaves no doubt that the practice of using USAJOBS for non-bargaining-unit applicants was both licit and long known by AFGE.⁵

The short answer to AFGE’s grievance, as clarified, is that the record is barren of evidence that VA actually applied its fledgling USAS program to any AFGE unit employees or that AFGE had any reasonable basis for so believing.

It is manifest, first of all, that VA had no intention of applying USAS to AFGE unit members without bargaining, and made that clear both externally and within the agency. In her letter of March 28, 2007, Deputy Assistant Secretary Flanz referred to the contemplated “Department-wide implementation” of the plan, but closed by offering a “briefing” or “bargaining.” An internal memorandum from Willie Hensley, another deputy assistant secretary, to Human Resource managers on December 5, 2007, cautioned that since the agency had not “met its national bargaining obligations,” the managers were to use USAS to fill “Title 5, NON-bargaining unit merit promotion recruitment positions only [bold in original],” and that they would be notified when they were permitted to give the program greater scope. On March 17, 2008, this limitation, with a reference to Hensley’s memorandum, was repeated to all Human Resource managers in an e-mail of that date from Ophelia Williams of the VA Recruitment and Placement Policy Service. The communications from Hutter to Lee referred to above similarly signal that the USAS program would not be installed agency-wide in the absence of bargaining.

At the hearing, the scant evidence presented by AFGE regarding the alleged application of USAS to the bargaining unit was considerably off the mark. In Vice-President Williams’ April 5, 2007, reply to Flanz, for example, he wrote that he had been told by several AFGE field officials that “HR Staff at VA Puget Sound HCS, American Lake, WA and Louis Stokes Cleveland Medical Center, Brecksville, have been filling bargaining unit positions with USA Staffing software.” When asked on direct about these conversations, Williams said, “I called, and after I talked to people, then they said that’s how they had been feeling. They said, ‘Yes, management was doing that.’ But

⁵ Flanz’s August 4, 2008, letter to AFGE, undisputed on this point, states that “VA and other Federal agencies have been using USAJOBS to advertise all types of vacancies for over ten years.” Her letter to AFGE of March 28, 2007, describing the scope and benefits of USAS and stating, *inter alia*, that it would utilize USAJOBS, only provoked a formal request from Vice-President Williams for bargaining about USAS. At the hearing, Williams testified, “I’ve known about the software USA Staffing, as well as USAJOBS, for years.” As noted, fn. 3, *supra*, USAJOBS must be utilized for Title 5 employment.

some of them said the management was only using it for non-bargaining unit employees.” Although Williams seemed an honest witness, one would suppose that if he had heard definite statements about in-unit use of USAS, grievances would have been filed and witnesses summoned to this hearing. They were not.

The only other evidence remotely related to the issue presented consisted of a few complaints from local unions which had nothing to do with USAS. An April 11, 2008, second-step grievance from a Fargo, North Dakota, local actually had to do with job announcements having been posted in “the Forum [probably a local newspaper] and USAJOBS.gov” and not with USAS processing (in response to the grievance, a manager had stated that the agency “recognizes its obligations contained in Article 22 of the master agreement”). A second submission from Fargo was a faxed inquiry to the national AFGE, on May 15, 2008, principally complaining that VA had violated the rule about affording “first consideration” to unit employees.⁶

The other evidence presented by AFGE was similarly unhelpful. Valorie Reilly, the president of the St. Petersburg, Florida, local union and also a member of two national committees, testified on cross to her “understanding” that USAS has been implemented for bargaining unit positions, but she was not sure where—“I believe it was in the northwest section of the states, but I could be wrong.” Then, on cross, she said that she was actually referring to concurrent internal and external announcements at her facility and others, but she did not contend that such a dual system would be improper. Melissa Miklos, a local president in Beckley, West Virginia, testified about an over-enthusiastic e-mail sent by a VA human resource representative to Beckley employees on May 14, 2008, stating that, among other news, “HR will also soon be switching over to USA Staffing, a faster, more accessible way for applicants to apply for positions at our facility!”(emphasis added). When Miklos investigated this assertion, a manager told her that “this was not supposed to be in effect and it hadn’t been agreed upon,” and he then sent that message to the local workforce.

Accordingly, I conclude that AFGE’s national grievance was untimely filed, that the record fails to support its assertion that VA violated Article 22 by applying its USAS program to bargaining unit employees, and that AFGE had no substantial reason to believe otherwise. I shall accordingly dismiss this grievance.

II. The Basic Facts of the VA Counter-Grievance

By letter of August 4, 2008, VA’s Flanz timely filed a response to AFGE’s June 27 national grievance. In the second part of the letter, Flanz set out a “Counter-Grievance.” There, she disagreed with AFGE’s position that automation of internal applications for bargaining unit positions “would require renegotiation of Article 22 of the VA-AFGE Master Agreement and cannot be negotiated as a mid-term change.” Flanz then rehearsed the potentially anodyne results of bargaining; expressed her belief that the “mid-term

⁶ AFGE errs in stating that, in the inquiry, the local “revealed that USA Staffing was being used at her VA facility.” No mention of USAS is made in the message, although a few pages of a pamphlet about USAS are included with the exhibit.

bargaining” contract provisions support VA’s right to require such bargaining about Article 22; and concluded that “the Department thereby grieves AFGE--NVAC’s refusal to bargain over the impact and implementation aspects of USA Staffing as a mid-term item in accordance with Article 44, Section 2 of the VA-AFGE Master Agreement.”

IV. Conclusions about the VA “Counter-Grievance”

Article 44 (“Mid-Term Bargaining”) establishes “a complete and orderly process to govern mid-term negotiations at all levels.” The heart of the article is the following sentence in Section 1 (“General”): “Recognizing that the Master Agreement cannot cover all aspects or provide definitive language on each subject addressed, it is understood that mid-term agreements at all levels may include substantive bargaining on all subjects covered in the Master Agreement, so long as they do not conflict, interfere with, or impair implementation of the Master Agreement.”

Section 2 of Article 44 is a lengthy provision addressed to the procedure for such “National” mid-term bargaining. With respect to bargainable mid-term proposals, it requires that VA will forward “all proposed changes” to AFGE along with copies of relevant documents. Thereafter, AFGE must file a demand for bargaining within 30 days, and, if that is done, the parties will “discuss the proposed change,” which discussions will begin with telephone negotiation “normally...for up to three hours a day.” If agreement is not reached, face-to-face bargaining will commence (with the negotiators working “8 ½ hour days” and other similarly detailed provisions, such as the number of negotiators for each team “based on the complexity and/or number of issues to be negotiated,” and the possible attendance of “experts”).

AFGE first contends that no such arbitrable animal as a “counter-grievance” exists in the VA-AFGE contractual universe. It is true that the Master Agreement does not employ that term, but since it does permit the parties to file “grievances” without prescribing any particular format, and since VA’s “Counter-Grievance” describes itself as a “National Grievance,” the fact that it happens to be in the same document as VA’s response to AFGE’s grievance does not detract from its facial legitimacy.⁷

A more substantial AFGE challenge is to the timing of the VA grievance. An archetypal refusal-to-bargain grievance arose as early as April 5, 2007, when, in response to Flanz’s offer to bargain about USAS, Williams declared that Article 22 was not subject to mid-term, as opposed to term, bargaining. Instead of taking action to dispute that position within the required grievance-filing period,⁸ VA simply let the potential grievance drop, so far as this record shows. Indeed, thereafter something akin to high-level bargaining took place when, in July 2007, AFGE’s Lee offered to engage in mid-term Article 22

⁷ AFGE has raised another procedural issue: that, after VA’s grievance was denied by AFGE, and VA subsequently invoked arbitration, it assertedly did not request a panel of arbitrators from FMCS as required by Article 40 (“Arbitration”), Section 2, but instead hitched a ride on AFGE’s panel request. While I have a strong suspicion that AFGE’s factual assertion is correct, there is no direct evidence in the record on this point, and there is no need to further consider the argument.

⁸ A “grievance” is very broadly defined in Article 42; it includes “any complaint by...Management concerning the interpretation or application of this Agreement....”

bargaining if VA would make certain concessions, a proposition which VA's Hutter declined to accept. By letter of January 13, 2008, as noted, Hutter again raised the subject with Lee and invited her to meet with him and a newly-appointed VA assistant secretary. The record does not disclose that the meeting transpired or that any further bargaining attempt was made between January 13 and the August 4, 2008, counter-grievance.

VA's failure to pursue the matter in accordance with the grievance requirements, either for some 16 months after Williams's firmly-stated 2007 position or for nearly seven months after Hutter's last-known effort, runs afoul of the plain intent of the grievance procedure mandating that the parties raise and settle disputes promptly. My previous comments on AFGE's similarly tardy filing apply: this sort of complaint does not lend itself to treatment as a "continuing" matter; if such a principle were to be invoked here, the cause of action would be potentially viable forever.

Still another procedural point should be addressed. Supplementing the foregoing mid-term bargaining provision, the parties entered into a July 2003 agreement called "Memorandum of Understanding Ground Rules" ("MOU"), which is intended to "govern the procedures for negotiating a Master Agreement." Article IX ("Mid-Term Negotiations") of the MOU contains the following language:"

In recognition of the fact that national issues may arise requiring bargaining by the parties, the Chief Negotiators of the Mid-Term Negotiating team will bargain unless they mutually agree to hold the matter in abeyance or either party refers the matter to the Master Agreement Negotiating Committee. The Chief Negotiators will determine whether the Master Negotiating Committee accepts jurisdiction over the issues."

Thus, the MOU provides that when a mid-term bargaining request is filed, the chief negotiators of the mid-term negotiating teams "*will bargain unless*" one of the situations described in Article IX obtains. It is theoretically possible that, under this scheme, a circumstance that would vitiate the seemingly mandatory "will bargain" requirement came into being: that is, the mid-term chief negotiators "mutually agree[d] to hold the matter in abeyance," or one of the chief mid-term negotiators referred the matter to the master negotiating committee (or, if that was done, the chief negotiators of the latter group somehow disposed of (or not) the issue). VA inquired into this potential issue at the hearing and again on brief.

The only relevant documentary evidence is a reference in an untitled, undated, and unsigned internal "white paper" concerning USAS which almost surely was composed by a VA agent. It states that Vice-President Williams "has referred the matter to the chief negotiators for the contract, Alma Lee and Max Lewis, for their determination whether to fold USA Staffing into the contract re-negotiation or refer it back to the mid-term bargaining teams," and that Lewis had been unable to contact Lee as of whatever time the document was published. But, when asked at the hearing whether the chief negotiators

had “accept[ed] jurisdiction over [the USAS bargaining issue], Vice-president Williams simply replied, “[T]here was never a letter sent to the chief negotiator [sic] to turn over USA Staffing, because, again, that is a term issue.” And a VA witness, labor relations specialist Doug Katcher, was asked whether the parties had agreed to hold the USAS matter in abeyance (he did not believe that was “ever done formally”) and whether the chief negotiators had accepted jurisdiction over the matter (he thought not).

As written, MOU Article IX is automatically triggered by every request for mid-term bargaining, and the “shall bargain” command would control unless its presumptive effect is negated as a result of the mechanisms listed in the Article. Here, the evidence is simply not conclusive as to what, if any, post-request activity occurred, although it bends in VA’s favor. But, as discussed above, since VA’s 2007 activity initiating its effort to engage in mid-term bargaining, it has never filed a timely grievance regarding AFGE’s refusal to agree to such bargaining or a failure to honor the MOU.

Having come this far, I think it appropriate to render a judgment on the substantive issue—whether, other things being in place, AFGE is contractually required to engage in mid-term bargaining about USAS (and consequently about changes in Article 22) while the re-negotiation of the 197-page collective agreement is still ongoing. It is not patent what the parties had in mind when they committed to require during a contract term “*substantive bargaining on all subjects covered in the Master Agreement*” (emphasis added) (so far, this sounds promising for the would-be bargainer) “so long as they [sic] do not conflict, interfere with, or impair implementation of the Master Agreement” (this gives heart to the other side). Neither party offered in evidence any precedential interpretation of this provision. While the proponent of mid-term bargaining almost always must want, in some manner, to alter or diminish or amend or supplement or abolish a “subject covered” in the existing contract, at the same time the proposed change is not permitted to “conflict” with the terms of the Master Agreement (since virtually every “substantive” alteration of the contract language in some sense represents a “conflict” with the existing agreement prior to the change, this wording likely refers to a conflict with the remaining agreement subsequent to the change).

Here, the available circumstantial evidence and inferences cut both ways. The comprehensive attention paid to the process of mid-term bargaining in the Master Agreement and MOU suggests that the drafters anticipated potentially significant mid-term negotiating while a contract is in effect. But if, as here, the parties are engaged in bargaining for a new overall agreement, is it likely that they reasonably intended to allow one entire negotiable provision—like Article 22—to be plucked out of the congeries of topics and separately considered, particularly one that seems to be a rather meaningful bargaining chip among the pile of chips on the table?

In the end, a reasoned guess must be made at what the parties may have been thinking. I suppose that they basically wanted the provision to allow them to address new ways of performing or structuring an existing function or task or process or benefit or working condition, or to include in their agreement a new such item, which (a) is deemed arguably necessary or appropriate due to exigencies or changes in circumstances, and which (b) if

agreed to, will not, to the extent possible, impinge upon existing contract rights, obligations, and procedures. The initial clause in Article 44, Section 1C--"Recognizing that the Master Agreement cannot cover all aspects or provide definitive language on each subject addressed"--indicates to me that in general, the contract, although not sacrosanct, must be greatly respected; moderate changes may be made, but bargaining about consequential ones, especially when contemporaneous with overall renewal bargaining, is a different matter.

Under this standard, I would think VA's grievance is not sustainable. OPM senior policy analyst Yee testified that the flexibility of USAS allows it to "mimic the [existing] internal process, but take advantage of the automation," so that changes from the present system could be only "minor, nothing significant or substantive." He was an impressive witness, as was VA human resources specialist Ophelia Williams, but I cannot disregard the fact that in her March 2007 letter to Lee and Williams, VA's Flanz spelled out a presumably well-considered list of seven "Changes in the Existing Application Process" entailed by the adoption of USAS. While not addressed in depth at hearing, these changes seem to promise useful improvement in the efficiency of VA's employment system, but, at the same time, do not have a ring of urgency, and they appear to constitute arguably important items to the Union membership. If the Article 22 process is to be altered, I believe it is a change that the drafters of Article 44 would have thought to be better left to consideration by Master Agreement bargaining.

III. AWARD

In accordance with the foregoing, the grievance filed by AFGE is denied and the grievance filed by VA is denied.



Bernard Ries
Arbitrator

May 19, 2009